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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 761

UNITED STATES OF AMERICA EX REL. MURRAY BRENSILBER, AND EMANUEL THEBNER, AND MURRAY BRENSILBER AND EMANUEL THEBNER, ON THEIR OWN BEHALF, PETITIONERS

v.

BAUSCH & LOMB OPTICAL COMPANY, CARL ZEISS, INC., M. H. EISENHART, CARL L. BAUSCH, AND THEODORE B. DRESCHER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF THE PETITION

PRELIMINARY STATEMENT

The petition for a writ of certiorari contains proper references to the opinion below (R. 267–269), the jurisdiction of this Court, the question presented, and the statute involved (R. S. 3490–3493, 5438). They will not be restated here.

We believe that the reasons for granting the writ stated in the petition present an adequate basis for review by this Court. In addition, however, we desire to point out in this memorandum that the decision below raises a question of public importance which will affect the right of the United States to recover damages and penalties under R. S. 3490–3493, and may affect the enforcement of other federal statutes. That question is: Whether a claim against the United States based on a contract procured as a result of an agreement between competitors that only one would submit a bid to the United States is fraudulent within the meaning of R. S. 5438 as incorporated in R. S. 3490–3493.

STATEMENT OF FACTS

This action was brought by petitioners in the name of the United States and in their own behalf pursuant to R. S. 3490–3493 to recover damages and penalties allegedly due the United States by reason of respondents' having submitted fraudulent claims to the United States. The allegations of the complaint and the agreements concerned,[1] so far as material here, may be briefly summarized as follows:

Bausch & Lomb Optical Company and Carl Zeiss of Jena, Germany, entered into an agreement to divide the world market for the sale of

[1] The original complaint appears R. 3–10, and the amended complaint appears R. 78–85. The agreements appear R. 145–161.

military optical instruments.[2] As part of the agreement Zeiss agreed that it would not sell to the United States and Bausch & Lomb agreed that it would not sell in the territory allocated to Zeiss.[3] Pursuant to the agreement Bausch & Lomb submitted bids to the United States, entered into contracts with the Government and received payment for the sale of military optical instruments.

Upon petition of respondents an order to show cause why the complaint should not be dismissed was issued by the District Court (R. 11–12, 46–48, 57–59) and supporting and counteraffidavits were filed (R. 13–38, 41–45, 49–56, 60–77, 249–253). On January 24, 1942, a final judgment was entered by the District Court dismissing the complaint (R. 254–262).

The opinion and judgment of the court below.— The court below, affirming the judgment of the District Court, held that although an agreement between two competitors that only one should submit a bid was a "wrong" on the United States, a claim based on a contract procured as the result

[2] Prior to the filing of the complaint in this cause respondents and Carl Zeiss of Jena, Germany, were indicted for violations of the Sherman Act and Section 73 of the Wilson Tariff Act (R. 86–109). The facts alleged in the complaint are similar to those set forth in the indictment.

[3] In this brief summary of the facts we have accepted the construction placed upon the agreement by the court below. As appears from the petition for certiorari, the contract between respondent and Zeiss included, in addition, an agreement by both parties to submit "protective offers."

of such an arrangement was not fraudulent within the meaning of R. S. 5438. The court reached this conclusion by construing the word "fraud" as used in the statute to be limited to the accepted common law sense of "deceit." There was no false representation here, the court said, since Bausch & Lomb in submitting its bid did not make any representation actual or implied that the bid was "normal," "reasonable," or "competitive," or that it had not collusively eliminated competition in the sale of military optical instruments to the United States. The court thought that this type of agreement was distinguishable from one such as that involved in *United States ex rel. Marcus* v. *Hess,* 317 U. S. 537, where each conspirator submits a collusive bid; there each bidder, except the one selected by them to secure the contract, falsely represents by his act of bidding that he hopes his bid will be accepted.

STATEMENT OF THE INTEREST OF THE UNITED STATES

The Government did not appear or participate in the proceedings below. However, we are directly interested in the questions raised on this appeal (1) because we believe that the court erroneously concluded that the claim is not fraudulent within the meaning of R. S. 5438, and (2) because the specific issues here involved are closely interwoven with problems of importance

to the United States in the enforcement of other federal statues.[4]

1. The stringent interpretation placed upon the word "fraud" as used in R. S. 5438 frustrates the purpose of the statute and turns the word into one of crippling limitation. This statute is designed to protect the United States against those who seek to "cheat it," as this Court noted in *United States ex rel. Marcus* v. *Hess,* 317 U. S. 537. Proponents, in urging passage of the bill, stated that its purpose was to eliminate "frauds and corruptions"[5] practiced on the United States and to prevent conspiracies formed for the purpose of "defrauding and plundering the Government."[6] The construction adopted below thwarts this broad purpose by making liability turn upon

[4] The United States also has a financial interest in the outcome of this litigation since it is entitled to recover one-half of any amounts collected in satisfaction of any judgment against respondents. In *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, this Court rejected the Government's contention that private individuals may not institute a suit under R. S. 3490–3493 based on facts revealed in an indictment returned by a grand jury after a Government investigation. By filing this brief the United States is not modifying its position that suits brought by private individuals under such circumstances may lead to situations in which the enforcement of the law is not promoted but frustrated. However, since the decision of the court below raises issues of public importance, the United States is filing this memorandum to bring its views before the Court.

[5] 62 Cong. Globe, p. 952; see also pp. 955 and 957.

[6] *Ibid*, p. 955; see also p. 956.

legal technicalities requisite to the common law offense of deceit rather than upon a consideration of the purpose of the statute and the evils it was designed to prevent.

Such an interpretation in fact renders the statute a nullity in its application to collusive bidding. The desired objective of the conspirators could always be secured with impunity simply by selecting the right means of accomplishment. If more than one of the conspirators submitted bids, the Government could recover damages. However, the same result could be achieved without liability by arranging that only one of their number should submit a bid. Only the unadvised would ever run afoul the statute under such a restrictive interpretation.

It is our view that a claim based on a contract secured as a result of any conspiracy to eliminate competitive bidding, no matter by what means it is carried out, is fraudulent within the meaning of R. S. 5438. See *United States ex rel. Marcus* v. *Hess,* 317 U. S. 537. See also *McMullen* v. *Hoffman,* 174 U. S. 639; and *Crocker* v. *United States,* 240 U. S. 74. That construction carries out the purpose of the statute and avoids artificial distinctions. No reason in public policy justifies such a distinction as that made by the court below, for any agreement between competitors to stifle competition violates public policy.

It is the unlawful objective to be achieved, not the particular means used, which the law condemns.

2. This case also raises questions broader than the specific issues involved. Although the decision of the court below relates only to the question whether the fraud prohibited by R. S. 5438 is confined to the accepted sense of deceit, the decision may have an effect upon the construction of other federal criminal statutes using similar terms.

Two important criminal statutes are derived from and contain language almost identical to that used in R. S. 5438. Section 35 (A) of the Criminal Code (18 U. S. C. 80) provides for the punishment of any person who presents or causes to be presented to the United States any claim knowing it to be "false, fictitious, or fraudulent." Section 35 (A) (18 U. S. C. 83) also condemns any conspiracy to defraud the United States by obtaining or aiding to obtain the payment of any "false or fraudulent" claim.

Other important criminal statutes use the word "fraud." Section 37 of the Criminal Code (18 U. S. C. 88) prohibits any conspiracy to defraud the United States, and the mail frauds statute (Section 215 of the Criminal Code, 18 U. S. C. 338) speaks of any scheme to defraud or for obtaining money or property by means of false

or fraudulent pretenses. Additional examples are set forth in the margin.[7]

The decision below interpreting the word "fraud" in the common law sense of deceit, and without reference to the purpose and history of the statute, establishes a principle of construction that may lead to a narrow interpretation of other statutes using the same term. A statute in which the word "fraud" appears should be construed to achieve the purpose of Congress, determined in the light of contemporary circumstances[8] and the evils which the statute sought to eliminate,[9] and to avoid unreasonable consequences not contemplated by the legislature. That the word "fraud" has no single narrow meaning is shown

[7] Alien Registration (8 U. S. C. 457 (c)) ("Any alien . . . who procures . . . registration . . . through fraud" shall be subject to fine, imprisonment, and deportation); Article of War 94 (10 U. S. C. 1566) (any person in military service who presents or assists in presenting "false or fraudulent" claim against the United States or who attempts to "defraud" the United States shall be subject to court martial); Judicial Code, Section 172 (28 U. S. C. 279) ("Any person who corruptly practices . . . any fraud . . . in the proof . . . or allowance of any claim . . . against the United States shall, ipso facto, forfeit the same to the Government"); Internal Revenue (26 U. S. C. 293 (b)) (If any deficiency in income tax is "due to fraud" a penalty shall be collected); Securities Act (15 U. S. C. 77q) prohibits use of any scheme "to defraud" in sale of securities.

[8] *Helvering* v. *N. Y. Trust* Co., 292 U. S. 455, 464–465; *Ozawa* v. *United States*, 260 U. S. 178, 194; *United States* v. *Katz*, 271 U. S. 354, 357; *United States* v. *Cooper Corp.*, 312 U. S. 600, 605.

[9] *Warner* v. *Goltra*, 293 U. S. 155, 158; *Denn* v. *Reid*, 10 Pet. 524, 527.

the fact that it has been held that "fraud" demned by the mail frauds statute is broader n the common law sense of deceit and the an- t crime of false pretenses.[10]

n authoritative decision of this Court deter- ing the application of R. S. 5438 will be of in the recovery of damages suffered by the ted States as a result of the submission of usive bids and will also be of assistance in enforcement of other federal statutes in which word "fraud" is used.

CONCLUSION

'or the foregoing reasons the United States pectfully submits that the petition for a writ certiorari to the Circuit Court of Appeals for Second Circuit should be granted.

CHARLES FAHY,
Solicitor General.
TOM C. CLARK,
Assistant Attorney General.

APRIL 1943.

United States v. *Groves*, 122 F. 2d 87, 90 (C. C. A. 2), iorari denied, 314 U. S. 670. See *Bradford* v. *United es*, 129 F. 2d 274 (C. C. A. 5), certiorari denied, Novem- 23, 1942, No. 455 this Term; *Pandolfo* v. *United States*, F. 2d 917 (C. C. A. 10), certiorari denied, October 12, 2, No. 223 this Term; *Leche* v. *United States*, 118 F. 2d (C. C. A. 5), certiorari denied, 314 U. S. 617; *Shushan Inited States*, 117 F. 2d 110, 115 (C. C. A. 5), certiorari ied, 313 U. S. 574. See also the briefs for the United tes in opposition to petitions for writs of certiorari in *ver* v. *United States*, 316 U. S. 690, and *McDermott* v. *ted States*, certiorari denied, February 15, 1943, No. 632, Term.

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